PHUA BENG HONG

v.

HO SHIK HO

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABU MANSOR ALI JCA
DENIS ONG JCA
[CIVIL APPEAL NO: J-02-298-1996]
26 FEBRUARY 2000

FAMILY LAW: *Matrimonial property - Division of property - How division to be made - Whether parties had made equal contribution - Whether there should be sale of asset and division of proceeds thereof*

FAMILY LAW: *Financial obligation - Maintenance payments - Whether maintenance ought to be paid - Circumstances of appellant and respondent - Whether future payments ought to be made - Change in circumstances of respondent*

This was an appeal against the decision of the High Court dismissing the claims of the appellant for maintenance for her son and herself and for certain assets of the respondent.

According to the facts, the appellant wife petitioned for divorce from the respondent on grounds of adultery. During the subsistence of the marriage, the following assets were acquired: (a) a plot of land with a bungalow house (asset no 2); (b) a plot of land with a double-storey terrace house (asset no 3); (c) a 3-storey shop-house (asset no 4); (d) a double-storey shop-house (asset no 5); (e) a Toyota motorcar (asset no 6); and (f) a double-storey house (asset no 7).

The hearing at the High Court dealt entirely with matters incidental to the dissolution, namely maintenance and division of matrimonial assets. The High Court dismissed the claims of the appellant for maintenance for her son and herself, for 1/2 share in asset no 3, for 1/3 share in the proceeds of the sale of asset no 5, and for 1/3 share in the proceeds of the sale of asset no 2. The High Court also ordered the appellant to deliver vacant possession of and to remove the caveat on asset no 3 and to transfer asset no 6 to the respondent. The High Court also ordered the respondent to pay a lump sum of RM25,000 to the appellant.

The extent of this appeal was only against those parts of the decision of the High Court dismissing the specific claims of the appellant, namely to a 1/2 share in asset no 3, to asset no 6 and lastly to arrears of maintenance for herself and her son.

Among the issues for consideration were: (a) whether asset no 3 was a matrimonial asset, subject to division under s. 76 of the Law Reform (Marriage & Divorce) Act 1976 ('Act 164'); (b) if so, whether its division should properly be made under sub-ss. (1) and (2) or under sub-s. (3) and (4) of s. 76 of Act 164; (c) whether there should be a sale of asset no 3 and a division of the proceeds thereof; (d) whether it was proper for the High Court to have taken into account the fact that the appellant had withdrawn RM65,000 from a joint account, in quantifying the monetary award for the appellant's past contribution to the house and family in the division of asset no 3; (e) whether asset no 6 should be transferred to the respondent; and (f) whether maintenance or future maintenance had to be paid to the appellant and her son.

Held:
Per Denis Ong JCA

[1] Asset no 3 was a matrimonial asset subject to division under s. 76 of Act 164. It was acquired solely by the respondent during the subsistence of the marriage.

[2] Since the appellant had contributed to the welfare of the family by looking after the house and caring for the family including her mother-in-law in the absence of the respondent most of the time, the appellant therefore was entitled under s. 76(3) and (4) of Act 164 to a reasonable proportion of asset no 3 in respect of such contribution.

[3] Since the appellant had a roof over her head and also for her son, she had no need for asset no 3 although she was entitled under s. 76(4) of Act 164 to a reasonable proportion of it by reason of her past contribution to the home and family. An order for sale or for the renting out of asset no 3 upon a vesting order made would leave the respondent without a roof over his head. That would result in injustice and hardship to the respondent. Given the circumstances of the parties, the result could only be said to be fair to both parties if the appellant and the respondent each had a separate nest to come home to roost after the divorce. It would therefore be sufficient if the appellant was given a monetary award instead.

[4] It was proper for the High Court to take into consideration – but not the entire sum of RM65,000 withdrawn from the joint account in quantifying the monetary award for the appellant. The High Court should have only taken into account half of RM65,000 which was RM32,500.

[5] Asset no 6 was a matrimonial asset subject to division under s. 76(1) and (2) of Act 164 although registered in the sole name of the appellant. Since the appellant had the use and possession of asset no 6 up to this day, which was six years from its acquisition, she must have had her moneys worth from the use of asset no 6 by now. The High Court was therefore correct in awarding asset no 6 to the respondent exclusively.

[6] On the issue of maintenance, it was found that there was no lack of funds to maintain the appellant and her son prior to 1991 because the respondent had been sending regular allowances to the appellant and, in addition, she had been in receipt of monthly rentals of RM400 to RM500 from asset no 2 before it was sold in 1989, and that neither the appellant nor her son was actually in dire straits from August 1991 because she was in receipt of RM5,000 from asset no 4. On the issue of future maintenance, in comparison to the respondent (who, after suffering a stroke, was jobless and had little or no prospect of being gainfully employed at the age of 60 plus), the appellant was better off in that she still received income from her part-time activity and could depend on her son for financial support. The respondent had no means and was in no position to support the appellant. However, should there be changes in his financial circumstances for the better, he should be ordered to maintain the appellant.

[Order accordingly.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini adalah suatu rayuan yang dibuat terhadap keputusan Mahkamah Tinggi yang menolak tuntutan perayu bagi nafkah hidup untuk anaknya serta dirinya dan bagi aset-aset tertentu kepunyaan responden.

Menurut fakta-fakta, perayu siisteri telah menuntut cerai daripada responden atas alasan berzina. Ketika pengekalan perkahwinan tersebut, aset-aset berikut telah diperolehi: (a) tanah tertentu dengan sebuah rumah banglo (aset no 2); (b) sebidang tanah dengan sebuah rumah teres dua tingkat (aset no 3); (c) sebuah rumah-kedai tiga tingkat (aset no 4); (d) sebuah rumah-kedai dua tingkat (aset no 5); (e) sebuah kereta jenis Toyota (aset no 6);

dan (f) sebuah rumah dua tingkat (aset no 7). Perbicaraan di Mahkamah Tinggi telah menyelesaikan secara keseluruhannya perkara-perkara yang bersampingan dengan pembubaran perkahwinan berkenaan, iaitu nafkah hidup dan pembahagian aset-aset suami-isteri. Mahkamah Tinggi telah menolak tuntutan-tuntutan perayu bagi nafkah hidup untuk anaknya serta dirinya, bagi 1/2 bahagian dalam aset no 3, bagi 1/3 bahagian dalam hasil jualan aset no 5 dan bagi 1/3 bahagian dalam hasil jualan aset no 2. Mahkamah Tinggi telah juga memerintahkan perayu untuk menyerahkan milikan kosong akan aset no 3 serta membatalkan kaveat ke atasnya dan untuk memindah-milikkan aset no 6 kepada responden. Mahkamah Tinggi juga telah memerintahkan responden untuk membayar jumlah sebanyak RM25,000 sekaligus kepada perayu.

Rayuan semasa ini hanyalah terhadap bahagian-bahagian keputusan Mahkamah Tinggi tersebut yang memerintahkan penolakan tuntutan-tuntutan spesifik perayu iaitu terhadap 1/2 bahagian dalam aset no 3, terhadap aset no 6 dan akhir sekali terhadap tunggakan nafkah hidup untuk anaknya serta dirinya.

Di antara isu-isu yang perlu dipertimbangkan adalah: (a) samada aset no 3 merupakan sebuah aset suami isteri (matrimonial asset), yang tertakluk kepada pembahagian di bawah s. 76 Akta Membaharui Undang-Undang (Perkahwinan & Perceraian) 1976 (‘Akta 164’); (b) samada pembahagiannya perlu dibuat dengan sempurna selaras dengan sub-s. (1) dan (2) atau sub-s. (3) dan (4) s. 76 Akta 164; (c) samada harus terdapatnya suatu penjualan akan aset no 3 dan pembahagian akan hasil-hasil daripada penjualan sedemikian; (d) samada ianya adalah wajar bagi Mahkamah Tinggi untuk mengambil kira akan hakikatnya bahawa perayu telah mengeluarkan jumlah sebanyak RM65,000 daripada akaun bersama, dalam memperhitungkan award kewangan bagi sumbangan perayu di masa lampau terhadap rumah berkenaan dan keluarga dalam pembahagian aset no 3; (e) samada aset no 6 harus dipindah-milikkan kepada responden; dan (f) samada nafkah hidup atau nafkah hidup di masa hadapan perlu dibayar kepada perayu dan anaknya.

Diputuskan:
Oleh Denis Ong HMR

[1] Aset no 3 merupakan sebuah aset suami isteri yang tertakluk kepada pembahagian di bawah s. 76 Akta 164. Aset ini telah diperolehi oleh responden dengan sendirinya ketika pengekalan perkahwinan tersebut.

[2] Memandangkan perayu telah menyumbang terhadap kesejahteraan keluarga tersebut dengan menjaga rumah serta memberi kasih sayang kepada keluarga yang termasuk ibu mertuanya meskipun dalam ketiadaan responden kebanyakan masanya, perayu adalah dengan itu tertakluk di bawah s. 76(3) dan (4) Akta 164 untuk mendapat sebahagian aset no 3 berhubung dengan sumbangannya yang sedemikian.

[3] Memandangkan perayu mempunyai sebuah rumah buat dirinya sendiri serta anaknya, beliau tidak ada keperluan bagi aset no 3 meskipun beliau berhak di bawah s. 76(4) Akta 164 untuk mendapat sebahagian yang wajar daripadanya berdasarkan sumbangannya di masa lampau terhadap rumah serta keluarga tersebut. Suatu perintah jualan atau penyewaan keluar akan aset no 3 setelah pemberian sebuah perintah letakhak akan mengakibatkan responden untuk kehilangan tempat kediamannya. Ini akan mengakibatkan ketakadilan dan kesusahan kepada responden. Dalam keadaan pihak-pihak berkenaan yang sedia ada, keputusan yang dapat dikatakan adil kepada kedua-dua pihak adalah hanya apabila perayu dan responden masing-masingnya mempunyai sebuah tempat kediaman yang tersendiri setelah perceraian mereka. Adalah dengan itu, cukup memadai sekiranya perayu diberikan award kewangan sahaja.

[4] Ianya adalah wajar bagi Mahkamah Tinggi untuk mengambil kira – tetapi bukannya keseluruhan jumlah sebanyak RM65,000 yang dikeluarkan daripada akaun bersama dalam memperhitungkan award kewangan kepada perayu. Mahkamah Tinggi seharusnya telah mengambil kira sebahagian daripada jumlah RM65,000, iaitu RM32,500.

[5] Aset no 6 merupakan sebuah aset suami-isteri yang tertakluk kepada pembahagian di bawah s. 76(1) dan (2) Akta 164 meskipun didaftarkan di bawah nama tunggal perayu. Oleh kerana perayu telah menggunakan serta memiliki aset no 6 setakat hari ini, iaitu enam tahun setelah pemerolehan, beliau dengan itu sudah pasti mendapat nilai bagi wangnya daripada penggunaan aset no 6 sehingga kini. Oleh yang demikian, Mahkamah Tinggi telah bertindak betul dalam mengawardkan aset no 6 kepada responden secara eksklusifnya.

[6] Mengenai isu nafkah hidup, ianya telah didapati bahawa tidak ada sebarang kekurangan dana (wang) dalam menyara perayu dan anaknya sebelum tahun 1991 kerana responden telah menghantar elaun secara lazimnya kepada perayu dan sebagai tambahan lagi, beliau telah menerima sewaan bulanan sebanyak RM400 hingga RM500 daripada

aset no 2 sebelum ianya dijual pada tahun 1989 dan bahawa baik perayu mahupun anaknya tidak sebenarnya mengalami kesengsaraan dari bulan Ogos 1991 kerana perayu menerima wang sebanyak RM5,000 daripada aset no 4. Berkenaan isu nafkah hidup di masa hadapan, berbanding dengan responden (yang mana setelah diserang penyakit 'stroke', sedang menganggur serta kurang atau tidak berpeluang langsung untuk diambil bekerja pada umurnya yang kini menjangkau usia 60 tahun), perayu jauh lebih baik kedudukannya dalam mana beliau masih menerima pendapatan daripada aktiviti sambilannya dan masih boleh bergantung kepada anaknya bagi bantuan kewangan. Responden tidak terdaya dan tidak mampu untuk menampung perayu. Walaubagaimanapun, sekiranya terdapat perubahan secara lebih menyenangkan dalam kedudukan responden dari segi kewangan, beliau harus diperintahkan untuk menyara perayu.

[Perintah sekadarnya.]

Case(s) referred to:

Button v. Button [1968] 1 WLR 457 ***(foll)***
Ching Seng Woah v. Lim Shook Lin [1997] 1 CLJ 375 ***(not foll)***
Evelyn Tan v. Tan Lim Tai [1973] 2 MLJ 92 ***(dist)***
Heseltine v. Heseltine [1971] 1 All ER 952 ***(refd)***
Jones v. Maynard [1951] 1 Ch 572 ***(refd)***
Lee Yu Lan v. Lim Thian Chye [1984] 1 MLJ 56 ***(refd)***
Moate v. Moate [1948] 2 All ER 486 ***(refd)***
Neo Tai Kim v. Foo Stie Wah [1985] 1 MLJ 397 ***(refd)***
Pettit v. Pettit [1970] AC 777 ***(refd)***
Re Bishop, deceased; National Provincial Bank v. Bishop [1965] 1 All ER 249 ***(not foll)***
Re Heng Peng Hoo & Anor [1989] 3 MLJ 103 ***(refd)***
Wachtel v. Wachtel [1973] 2 WLR 366 ***(refd)***
Wong Amy v. Chua Seng Chuan [1992] 2 SLR 360 ***(refd)***

Legislation referred to:

Law Reform (Marriage and Divorce) Act 1976, ss. 57(1)(e), 76(1), (2)(a), (3), (4)(a), (5)

Divorce and Matrimonial Proceedings Rules 1980, r. 56(1)(b), (2)(a)

Other source(s) referred to:

Halsbury's Laws of England, 4th edn, vol 22, para 1037

For the appellant - N Navaratnam; M/s Logan Sabapathy & Co
For the respondent - Teo Say Koon; M/s Teo & Assoc

[Appeal from High Court, Johor Bahru; Divorce Petition No: 33-178-1994]

Reported by Mariette Peters-Goh

JUDGMENT

Denis Ong JCA:

The appellant, who was the wife petitioner, married the respondent according to Chinese custom and the marriage was registered in Miri Sarawak on 4 March 1972 under the Chinese Marriage Ordinance Chap. 74 (Sarawak). They had a son named Ho Sheow Kuan born in Miri on 9 July 1975.

Before the marriage the respondent acquired a double-storey terrace house in Miri (Asset No. 1) with his own money and some contribution from his mother. Asset No. 1 was registered in the sole name of the respondent. In 1975 or 1976, Asset No. 1 was disposed of by the respondent for RM20,000 to RM30,000.

During the subsistence of the marriage the following assets were acquired:

(a) In 1973, Lot 305 Block 4 Miri Concession Land District together with a bungalow thereon (Asset No. 2). Asset No. 2, which was acquired by the respondent, was registered in the names of both the appellant and the respondent. While in Miri, the appellant, her son and mother-in-law lived together in Asset No. 2. Asset No. 2 was disposed of during the subsistence of the marriage either in 1989 or 1991 for a sum of RM128,000 according to the appellant or RM130,000 according to the respondent. It was not disputed by the appellant that the proceeds of sale were credited into the joint account of the appellant and the respondent and that before the sale, Asset No. 2 was rented out at a monthly rent of RM400 to RM500 which were collected by the appellant's nephew but not credited into that joint account;

(b) in May 1976, the respondent acquired a parcel of land comprised in HS(D)10272 MLO 8172 Mukim Plentong together with a double-storey terrace house at No. 1 Jalan Cermat Satu, Taman Maju Jaya Johor Bahru (Asset No. 3). Asset No. 3 was registered in the name of the respondent. In the same year the family moved from Miri to Johor Bahru and lived in Asset No. 3. It was not known at what price Asset No. 3 was acquired except that the proceeds derived from the sale of Asset No. 1 were utilised to finance its acquisition. From the available documentary evidence pertaining to Asset No. 3, it was a recorded fact that in November 1984 Asset No. 3 was charged to Malayan Banking Bhd (MBB) to secure an overdraft facility of up to RM50,000 for the expressed purpose of investment. The overdraft account was one and the same joint account referred to earlier. In March 1992, a second charge on Asset No. 3 was registered to secure an increase in the overdraft facility to RM100,000. These charges were discharged subsequently;

(c) in November 1979 the respondent purchased a 3-storey shophouse at No. 14, 14A-B, Jalan Serampang, Taman Sri Tebrau, Johor Bahru situated on land comprised in HS(D) 39843, PTD 17853 Mukim Plentong (Asset No. 4) at the cost of RM240,000 of which the appellant contributed RM3000 from her savings and the balance was paid by way of a loan from Malaysia Building Society Bhd. to whom Asset No. 4 was charged. Asset No. 4 was registered in the names of the appellant and the respondent. In December 1989 the charge to Malaysia Building Society Bhd. was discharged. On 10 February 1993 Asset No. 4 and Asset No. 3 were charged to MBB to secure an overdraft facility of RM300,000 Asset No. 4 was rented out for thirty months at RM5000 pm. The rents collected by the appellant were paid into the joint account and were used to service the overdraft facility and for household expenses. In March 1994, Asset No. 4 was sold to Index Holdings Sdn. Bhd. at a price of RM800,000. Out of the proceeds of sale, a sum of RM400,000 was utilised to settle the debt owing to MBB from the overdraft facility. Asset No. 3 was thereby discharged. The balance of RM400,000 was divided between the appellant who acknowledged that she received RM214,000 and the respondent who admitted that he received RM196,000 respectively;

(d) a double-storey shophouse at No. 86 Jalan Nakhoda 2, Taman Ungku Tun Aminah, Johor Bahru (Asset No. 5) acquired by the respondent at the price of RM165,000 and registered in the names of the appellant and the respondent. The respondent said that Asset No. 5 was acquired in 1984 and disposed off in 1986. The appellant however said that it was acquired in 1981 and disposed of in 1989. They agreed that Asset No. 5 was sold at RM137,000, a loss of RM28,000. The respondent said that he acquired Asset No. 5 with a loan from Magnum Finance and that the proceeds of sale was used to repay his brother who made the monthly repayments to Magnum. The balance of the proceeds of sale amounting to RM10,000 was credited into the same joint account that he had with the appellant;

(e) in 1993 the respondent purchased a brand new Toyota motorcar bearing registration plate No. JCK 2881 (Asset No. 6) for RM65,000 which was registered in the name of the appellant. Asset No. 6 was intended for the use of the family in replacement of an old one; and

(f) in 1994 the appellant purchased a double-storey dwelling house in Taman Desa Cemerlang Johor Bahru (Asset No. 7) for RM150,000 which was registered in her sole name. She withdrew RM65,000 from the joint account in part payment of the purchase price.

By a petition dated 1 July 1994 presented in the Johor Bahru High Court, the appellant sought a dissolution of her marriage to the respondent on the sole ground of adultery she alleged against him and also for maintenance and a division of the matrimonial assets. In answer to the petition, the respondent denied adultery. At the hearing, he consented to the dissolution but maintained his denial of adultery. Thus hearing in the High Court concentrated entirely on matters incidental to the dissolution, namely, maintenance and the division of matrimonial assets.

On 25 April 1996 the High Court granted a decree nisi to be made absolute within three months, dismissed the claims of the appellant for maintenance for her son and herself, for 1/2 share in Asset No. 3, for 1/3 share in the proceeds of sale of Asset No. 5 and for 1/3 share in the proceeds of sale of Asset No. 2. It also ordered the appellant to deliver vacant possession of and to remove the caveat on Asset No. 3 and to transfer Asset No. 6 to the respondent. In respect of the respondent, the High Court dismissed his claim for the refund of thirty months rent received by the appellant from the renting of Asset No. 4 and further ordered him to pay a lump sum of RM25,000 to the appellant.

Notwithstanding the notice and the memorandum of appeal, both of which clearly stated that the appeal was against the whole of the decision of the High Court, the extent of the appeal to this court was only against those parts of the decision of the High Court which ordered the dismissal of specific claims of the appellant namely, to 1/2 share in Asset No. 3, to Asset No. 6 and lastly to arrears of maintenance for herself and the son. There was no cross-appeal by the respondent.

In the course of the hearing of this appeal on 12 May 1997, learned counsel on both sides were directed to put in written submissions not later than 15 July 1997 and judgment was reserved. These submissions were received on 13 June 1997.

So much for the facts and background circumstances of this appeal.

From the facts just recounted, it was observed that Asset No. 4 and Asset No. 5 were acquired and disposed of during the subsistence of the marriage. Part of the proceeds of sale thereof were utilised to settle debts incurred and the balance divided between the parties or credited into their joint account so that at the time when the decree nisi was granted or indeed at the time of presentation of the petition by the appellant there was nothing left of the proceeds of sale of Asset No. 4 or of Asset No. 5 for the High Court to divide. Maintenance apart, what remained for the division by the

High Court at the time of making the decree nisi were Asset No. 3 and Asset No. 6, there having been no claim made by the respondent to Asset No. 7. We will deal firstly, with the division of Asset No. 3 and Asset No. 6 in that order and secondly, with the matter of maintenance.

Before the High Court, three matters concerning Asset No. 3 were canvassed. They were:

(a) whether Asset No. 3 was a matrimonial asset subject to division under s. 76 of the Law Reform (Marriage and Divorce) Act 1976 (Act 164) (matter (a));

(b) if so, whether its division should properly be made under sub-ss. (1) and (2) or under sub-ss. (3) and (4) of s. 76 (matter (b)); and

(c) whether there should be a sale of Asset No. 3 and a division of the proceeds thereof. Otherwise, what was the proper order to make, given the circumstances of the parties (matter (c)).

On matter (a) it was accepted on both sides and by the High Court that Asset No. 3 was a matrimonial asset subject to division under s. 76. On matter (b) the High Court decided that as Asset No. 3 was acquired solely by the respondent during the subsistence of the marriage and the appellant contributed to the welfare of the family by looking after the home and caring for the family including the mother-in-law in the absence of the respondent most of the time, the appellant was entitled under s. 76(3) and (4) of Act 164 to a reasonable proportion of Asset No. 3 in respect of such contribution. Taking into account that the appellant had already received an aggregate sum of RM379,075 out of the matrimonial assets, in monetary terms a reasonable figure for her contribution was RM25,000. On matter (c), it decided that having regard to his age, his health condition after suffering a stroke, his desire to return to Johor Bahru to live in Asset No. 3, the fact that the parties could not reasonably be expected to live together after the divorce and the appellant had acquired Asset No. 7 in her sole name for herself and the son to occupy at the cost of RM150,000 of which RM65,000 came from the joint account, and the respondent did not claim any part of it, an appropriate order to make in those circumstances was not a vesting order or an order of sale consequential upon a division of Asset No. 3 but an order for a monetary award that the respondent pay the RM25,000 to the appellant in full settlement of her contribution.

Before us the appellant accepted the fact that Asset No. 3 was acquired during the subsistence of the marriage and the nature of her contribution namely, to the home and family as found by the High Court. What she disputed was the conclusion of fact in matter (b) namely, that Asset No. 3 was acquired by the sole effort of the respondent and consequently the High Court determination on a point of law on matter (b) namely, that Asset No. 3 should be divided under s. 76(3) and (4) of Act 164. The nature of the appellant's contribution which the High Court found, was that she had been a wife to the respondent, a mother to their child and a daughter-in-law who took care of her mother-in-law for thirteen years, Mr N Navaratnam of learned counsel for the appellant relied on the respondent's acknowledgement in his evidence that the appellant's contribution was "significant" and submitted that although the purchase price of Asset No. 3 was paid solely by the respondent, Asset No. 3 was not to be regarded as having been acquired by his sole effort. In support of his submission, he referred to certain passages in the judgment of this court in *Ching Seng Woah v. Lim Shook Lin* [1997] 1 MLJ 109 (CA) at pp. 122E-G, 124F-I adding that under s. 76(2) the court should be inclined towards an equal division.

Mr Teo Soo Koon of learned counsel for the respondent supported the finding of fact by the High Court that Asset No. 3 was acquired during the marriage by the sole effort of the respondent. He pointed out that it was purchased and registered in his sole name with proceeds of sale from Asset No. 1 which the respondent acquired before the marriage. Asset No. 1 was also registered in his sole name. He submitted that it was never the intention of the respondent to share Asset No. 3 with the appellant. He observed that the appellant did not contribute to the purchase price whatever nor did she make any substantial improvement to Asset No. 3. He agreed with the finding of fact by the High Court that the appellant contributed to the welfare of the family by looking after the home and caring for their child and further that this form of contribution came under s. 76(4). Under sub-s. (4) the respondent should receive a greater proportion of Asset No. 3.

In relation to matter (b) Mr. J. Puthucheary learned counsel for the appellant in the High Court submitted that Asset No. 3 was not to be regarded as having been acquired by the sole effort of the respondent because the appellant had contributed significantly towards acquiring it by working as a housewife since 1972, caring for her mother-in-law for 13 years and their son since birth. For its decision on matter (b) the High Court stated the reasons in its judgment thus:

> The evidence shows that the matrimonial house was acquired during the marriage by the sole effort of the respondent; he bought it in 1975 from the proceeds of sale of another house in Miri which he owned prior to his marriage with the petitioner. However the evidence also shows that the petitioner has looked after the matrimonial house since 1976. The burden of looking after the house and simultaneously the burden of caring for the family including her mother-in-law fell upon her and under the circumstances, I would think that her contribution in this form should be given due consideration. This form of contribution would clearly fall within the contemplation of the provisions of section 76 of the Act which provides –
>
> (1) ...
>
> (2) ...
>
> (3) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.
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> (4) In exercising the power conferred by subsection (3) the court shall have regard to –
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> (a) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family;
>
> (b) the needs of the minor children, if any, of the marriage;
>
> and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable; but in any case the party by whose effort the assets were acquired shall have a greater proportion.

It was clear from the excerpt quoted that the High Court had in mind the provisions of s. 76(1), (2), (3) and (4) relevant to the different nature or form of the contributions of the respondent and of the appellant in relation to the evidence presented and the argument advanced. On this score its conclusions of fact that Asset No. 3 was acquired by the sole effort of the respondent, the latter having contributed directly in the form of money derived from the sale of his separate property (ie, Asset No. 1) to the purchase price and the contribution of the appellant was to the welfare of the family by her work or services as a wife, a mother and a daughter-in-law were, in our view, correct and well justified. It was noteworthy here that it was never in dispute that the appellant did not contribute in the form of money or property whatever to the purchase price of Asset No. 3.

Mr. Navaratnam did not expressly state in his written submission to us that the High Court had erred in its conclusions of fact or that such conclusions were not justified. He merely stated that Asset No. 3 was not to be regarded as having been acquired by the sole effort of the respondent taking into account the significant extent of her contribution and cited certain passages of this court in *Ching Seng Woah's* case and added that under s. 76(2) the court should be inclined towards an equal division. With respect, his submission was by no means clear in the sense of whether he was resurrecting the same submission of Mr. Purhucheary mentioned before or whether he was breaking new ground before us namely, that by working as a housewife since 1972, caring for her mother-in-law for 13 years and their son since birth, the appellant had contributed to a significant extent to the maintenance and improvement of Asset No. 3. The wording of his submission followed closely that of Mr. Puthucheary's which suggested the first alternative but the citation of passages from *Ching Seng Woah's* case suggested the second alternative. Mr. Teo understood Mr. Navaratnam to mean both and submitted accordingly.

On the first alternative submission, the High Court decided that the appellant's contribution "clearly fall within the contemplation of the provisions of s. 76 ... ((4)(a))". By implication this meant that the appellant's contribution did not fall within the provision of s. 76(2)(a) as was obvious from the word "clearly". The point at issue here was whether or not the appellant acquired a proprietary beneficial interest in Asset No. 3 by her contribution as a wife to the respondent, a mother to their child and a daughter-in-law who looked after her mother-in-law for 13 years so that Asset No. 3 could be regarded as having been acquired by the joint efforts of both the respondent and the appellant. A case in point was *Button v. Button* [1968] 1 WLR 457 (CA) where the wife had done work on the husband's house but had made no financial contribution. The registrar who heard the wife's application at first instance found that she was entitled to a half share for the reason that it was in part at least due to her efforts that the cottage purchased for £2000 in 1956 realised £3,050 when it was sold in 1958. The English Court of Appeal allowed the husband's appeal and held that the wife having made no financial contribution to the purchase of the cottage and having done no more than a wife usually did for the benefit of the family, had no interest in the matrimonial home. Lord Denning MR giving his reasons for the decision stated at pp. 461-2 thus:

> The question is whether in point of law and fact the registrar's finding is justified ... When the matrimonial home belongs to the wife (such as when it is ... or paid for by her own money), the husband does not get a share in the house simply because he puts up a shelf or touches up a window sill or even

paints and decorates a room. He has the benefit of living in the house rent free. He does not have to provide a roof over her head. He should not be entitled to a share in the house simply by doing the "do-it-yourself jobs" which husbands often do. He may, however, be entitled when the work is of a kind which normally a contractor is employed to do. The reason is because the court may then infer that the parties, if they had thought about it, would have agreed that if they separated, then in adjusting their financial affairs, the husband should be given a share in the proceeds of the house commensurate with the work he had done.

Now consider the converse position when the wife does work in the husband's house. Hitherto the cases have all been concerned with a wife's financial contribution. If she puts some of her savings into the purchase of the house or if she goes out to work and earns money which helps, directly or indirectly, to pay the instalments to the building society, then she is usually entitled to a share in the house, and it is often a half share, see *Rimmer v. Rimmer* [1953] 1 QB 63; *Fribance v. Fribance (No 2)* [1957] 1 WLR 384. But she does not get a share if her financial contribution is not substantial. That is shown by *Julley v. Julley* [1965] 109 Sol J 956, CA. This is the first case, I think, to come before us where the wife had done work on the husband's house but has made no financial contribution. I think that similar principles apply as when it is the other way about. The wife does not get a share in the house simply because she cleans the walls or works in the garden or helps her husband with the painting and decorating. Those are the sort of things which a wife does for the benefit of the family without altering the title to, or interests in, the property. Take the present case. The wife was economical in spending on the housekeeping, as most wives are. She helped with the decorating and improvements to the house as many wives do. It no doubt improved the value of the property. I was inclined during the argument to accept that her work was so great as to entitle her at least a share in the house. But after discussion with my brethren, I have come to the conclusion that the proper inference from the evidence is that it was the ordinary kind of work which a husband or wife may do on the matrimonial home without giving the other a share or interest in it.

Both Dankwerts and Widgery LJJ. agreed with Lord Denning MR. At pp. 462-3, Danckwerts LJ observed thus:

As regards the further question as to whether husband or wife, as the case may be, is entitled to a share in the house which is in the name of the other, the matter is more difficult. I concede that where money contributions have been made by both husband and wife, there may well be an intention that there should be shares in the ownership of the house, in whosoever name the house may happen to be. But where the claim is based upon work done, it seems to me the matter is more problematical and it is more difficult to ascertain an intention to give any particular share.

> This seems to me to be one of those cases, and it seems to me there was not work done in this case which would justify the court in holding that the wife was entitled to a share in the house which was in the husband's name.

The views of Lord Denning M.R. in *Button's* case were approved by the House of Lords in *Pettit v. Pettit* [1970] AC 777 at pp. 796, 807, 818 and 826.

In the High Court Mr. Puthucheary cited a passage from the judgment of the English Court of Appeal in *Wachtel v. Wachtel* [1973] 2 WLR 366 at p. 367 in support of his contention that Asset No. 3 was not to be regarded as having been acquired by the sole effort of the respondent because the appellant had contributed significantly towards acquiring it by working as a housewife since 1972, caring for the motherin-law for 13 years and their son since birth. The passage in *Wachtel's* case relied upon, read thus:

> We may take it that Parliament recognised that the wife who looks after the home and family contributes as much to the family assets as the wife who goes out to work. The one contributes in kind. The other in money or money's worth. If the court comes to the conclusion that the home has been acquired and maintained by the joint efforts of both, then when the marriage breaks down, it should be regarded as the joint property of both of them, no matter in whose name it stands. Just as the wife who makes substantial money contributions usually gets a share, so should the wife who looks after the home and cares for the family for 20 years or more.

In addition Mr. Puthucheary also cited the Singapore case of *Evelyn Tan v. Tan Lim Tai* [1973] 2 MLJ 92. Although the High Court in our present case under appeal did address its mind to s. 76(1), (2), (3) and (4) and decided that the contribution of the appellant clearly fell within the contemplation of the provisions of s. 76(4)(a) and gave its reasons, it was silent as to why such contribution should not be regarded as a contribution towards acquiring Asset No. 3 having regard to the holding of the Court of Appeal in the excerpt quoted from *Wachtel's* case so that Asset No. 3 be divided in equal shares under s. 76(2) on the ground that it was acquired by the joint efforts of both parties as the appellant claimed and Mr. Puthucheary had contended.

As we understand the excerpt, the English Court of Appeal in that case did not regard the contribution of a wife who looked after the home and cared for the family as a contribution towards the acquisition of the family asset as contended by Mr. Puthucheary and consequently that excerpt did not support his submission. It treated such a contribution as a contribution in kind towards the maintenance of the family asset. That treatment was

consistent with the views expressed in the recommendations of the U.K. Law Commission in their Report on the Financial Provision in Matrimonial Proceedings (Law Com. No. 25) and also with the text of s. 5(1)(f) of the U.K. Act namely, contribution to the "home and family". As to a wife who went out to work, that was regarded as a contribution "in money or money's worth" to the acquisition of the family asset which was the position accepted in case law.

On this point there was no change in the views of the Law Commission or of the Court of Appeal. The position in the U.K. seemed no different from the position in Malaysia up to this point. But the English Court went a step further by treating contribution towards the acquisition and contribution towards the maintenance of the family asset on an equal footing in law so that it was open to the English Court to conclude that the home had been acquired and maintained by the joint efforts of both and to regard it as the joint property of both and each one had a share in it. In these respects, the position in Malaysia seemed to differ from that in the U.K. s. 76 of Act 164 treats contribution towards the acquisition and contribution towards the improvement of the matrimonial asset on the same footing but not in respect of contribution towards the maintenance. The expressions "joint efforts" and "sole effort" are used only in relation to the contribution of the parties or party towards the acquisition or improvement of the matrimonial asset. Contribution towards the maintenance of the matrimonial asset is recognised and dealt with in s. 76(4)(a) under "the other party who did not acquire the assets". In the division of assets between them, the court was directed that in any case the party by whose effort the assets were acquired was to receive a greater proportion and the other party was to receive a reasonable proportion. These differences did not concern us in this appeal and were best left for another time.

The facts in *Evelyn Tan's* case were different from those of the present appeal. That was a case of both spouses working and earning monthly salaries from the Singapore Government. Although the matrimonial asset was registered in the sole name of the husband, the Singapore Court of Appeal held that the wife was entitled to a half share of the asset because she had made a substantial financial contribution towards the acquisition of the asset by surrendering her entire pay to the husband from 1958 until she left the home in 1970. The Court of Appeal read into that gesture an intention common to both spouses to share the house at least equally. There was no mention in the judgment of the wife making any contribution to the home and family.

The second alternative submission as we said before was never raised or argued in the High Court. Consequently, there was no decision by the High Court on it. In any event the point apparently taken by Mr. Navaratnam namely, whether or not the significant contribution of the appellant to the home and family was improvement in terms of s. 76(5) was already answered in the negative by the English Court of Appeal in *Button's* case. There was no evidence in our present case to establish that the appellant used her own money to run the house and family or to buy furniture or crockery for the house and Mr. Navaratnam did not identify any. Further, there was no evidence that Asset No. 3 had appreciated in value. On the facts of this case, without more, we could not see how the liberal approach adopted by this court in *Ching Seng Woah's* case could be applied.

In the premises we found no merit in the first or second alternative submission of learned counsel and consequently no reason to disturb the decision of the High Court on matter (b).

On matter (c), Mr. Navaratnam submitted before us that given the fact that the appellant had no source of income the fairest result was to vest Asset No. 3 in the joint names of both the respondent and the appellant in the ratio of 51:49 and to stipulate that Asset No. 3 be rented out and that the rent received be shared between them in the same ratio; alternatively, that Asset No. 3 be sold and the proceeds of sale divided between them in the same ratio.

Mr. Teo submitted that whether there should be a vesting order, a sale of Asset No. 3, a monetary award and the quantum thereof were matters for the discretion of the High Court. Further, he said that it was not for the Court of Appeal to interfere unless that discretion was wrongly exercised. He supported the monetary award of RM25,000 made by the High Court after considering the entire evidence. He pointed out that such an award was not unprecedented as in *Re Heng Peng Hoo & Anor* [1989] 3 MLJ 103 and in *Wong Amy v. Chua Seng Chuan* [1992] 2 SLR 360. He was opposed to a vesting order and renting out Asset No. 3 on the ground that it would be inappropriate, inequitable and would cause grave hardship to the respondent because they are no longer spouses and the respondent needed a roof over his head. In the latter regard he pointed out that the appellant was not without one (Asset No. 7) where she now lives.

On the quantum of monetary award, Mr. Navaratnam submitted before us that firstly on the principle in *Re Bishop (decd); National Provincial Bank v. Bishop* [1965] 1 All ER 249, the High Court erred in taking into account the RM65,000 which the appellant withdrew from the joint account in fixing the quantum at RM25,000. He drew attention to the fact that the

Singapore Court applied *Re Bishop's* case in *Wong Amy's* case although *Re Bishop's* case had not been cited in any reported Malaysian case. Secondly, if the High Court was right to do so, then it should also take into account the total amount of money's withdrawn by the respondent from the joint account.

Mr. Teo was silent on the application of *Re Bishop's* case. However, he pointed out that the fact was that the appellant withdrew RM65,000 from the joint account to purchase Asset No. 7 and the High Court took that fact into consideration as did the Singapore Court in *Wong Amy's* case. On the second point of Mr. Navaratnam, Mr. Teo countered by saying that the withdrawals by the respondent from the joint account were for the logging business in Sabah and with the consent of the appellant. He said that logging business was a high risk business and should it have prospered it would have benefitted both spouses. On the other hand, should such business fail as it turned out to be the case, it would be unreasonable to take such withdrawals into account solely against the respondent but not against the appellant.

So far as having a roof over her head and also for the son, the appellant had no need for Asset No. 3 although she was entitled under s. 76(4) of Act 164 to a reasonable proportion of it as the High Court held by reason of her past contribution to the home and family. Asset No. 7 was purchased at the price of RM150,000. RM65,000 was withdrawn from the joint account to pay towards the purchase price and the account, closed thereafter. Asset No. 7 was registered in her sole name and the respondent made no claim to it.

The same could not be said for the respondent. Other than Asset No. 3, he had no roof over his head. He is over 60 years old now, had suffered a stroke and is not gainfully employed. He lives in rented premises in Sabah and desires to return to his hometown Johor Bahru to live in Asset No. 3.

With the needs of both parties in mind, we cannot agree more with the High Court that the appropriate order to make in the circumstances was a monetary award in respect of her past contribution to the home and family instead of an order vesting the appellant with a proprietary interest in Asset No. 3 or an order of sale. So far as proper provision for herself and the son is concerned, that was taken care of by the appellant unilaterally at or about the time the divorce petition was filed with funds from the joint account. An order of sale or renting out Asset No. 3 upon a vesting order made as the appellant suggested, would leave the respondent without a roof over his head. That would result in injustice and hardship to the respondent

who would then be in no position to fulfil his desire to return to Johor Bahru. Given the circumstances of the parties, the result could only be said to be fair to both sides if the appellant and the respondent each has a separate nest to come home to roost after the divorce. The order by the High Court of a monetary award to the appellant achieves that result evenly: see *Wachtel's* case at p. 378C.

On quantum, the question raised by Mr. Navaratnam was whether it was proper for the High Court to have taken into account the RM65,000 which the appellant withdrew from the joint account to purchase Asset No. 7 in fixing the quantum of monetary award for her past contribution to the home and family in the division of Asset No. 3.

The joint account referred to was no other than A/C No: 001123301345 with Malayan Banking Bhd in Johor Bahru. It was opened in 1976 in the joint names of the appellant and the respondent after they moved from Miri to Johor Bahru. It started off as a savings account into which the respondent periodically remitted his earnings received from his employment in Indonesia and subsequently with rents received from Asset No. 4 and the balance of the proceeds of sale of Asset No. 5. The balance of the proceeds of sale of Asset No. 4 amounting to RM400,000 was not credited into that account; instead, it was divided between them. The appellant acknowledged that she received RM214,000 and the respondent, RM196,000. Monthly rents of RM400 to RM500 collected from Asset No. 2 by the appellant's nephew over the years were also not credited into the account. There was also no evidence that the appellant credited any portion of her part time earnings into that account.

When overdraft facilities were granted by Malayan Banking Bhd to the respondent by way of charges secured on Asset No. 4 and Asset No. 3, such facilities were operated on the same account and payments received from that bank were credited thereto. The overdraft facilities were approved by the bank expressly for the purpose of investment in business.

The major items of withdrawals from that account consisted of remittances of various amounts by the appellant to the respondent in Sabah from time to time and at his request, charges for the overdraft facilities, and household running expenses for the appellant and the son in Johor Bahru.

From the foregoing, it would appear that what started off as a savings account so described by the respondent in para 2(b) of his answer to petition was converted into a savings cum business account which subsequently reverted to a savings account after the overdraft facilities were discontinued with the discharges of Asset No. 3 and Asset No. 4 and the sale of Asset No. 4 and division between them of the balance of the proceeds of sale.

From the submissions and reply in writing of both sides in the High Court and before us, it was common ground that the joint account in question was a mixed fund and a common fund to which both had contributed although largely by the respondent. The appellant managed the joint account: she had custody of the cheque book and was responsible for any withdrawal or deposit. This arrangement between them was a matter of convenience rather than of choice because she lived in Johor Bahru where the account was while he was offshore on business most of the time.

Nothing was known of the exact balance standing to the credit of the joint account before its closure by the appellant except the fact that she withdrew RM65,000 from that account before its closure and appropriated that sum to the acquisition of Asset No. 7.

There was no mention of Asset No. 7 by the appellant in her petition or reply by the respondent in his answer to the petition. There was no mention of the RM65,000 by the appellant in her petition. The RM65,000 withdrawn by the appellant from the joint account in May 1994 was brought up by the respondent in para 2(b) of his answer in response to the prayers in para 8 of her petition. In her reply, the appellant implicitly acknowledged that she withdrew the RM65,000 from the joint account expressly to supplement household expenses. She complained of insufficient funds to expend on household needs as the respondent hardly sent home money.

Cross-examined by Mr. Teo, the appellant admitted that she withdrew the RM65,000 from the joint account and that such money belonged to them jointly. She admitted that the RM65,000 was used by her to purchase Asset No. 7 because she was compelled to do so to provide alternative accommodation for herself and the son as she felt uncomfortable and insecure living in Asset No. 3 which was in the sole name of the respondent. She said that Asset No. 7 registered in her sole name, was a double storey house suitable and sufficient for herself and the son and that the purchase price was more than RM150,000. She did not approve of the respondent living under one roof with her in Asset No. 7 as she feared physical violence.

In the High Court Mr. Teo submitted that the respondent was entitled to one-half (1/2) share of Asset No. 7 because Asset No. 7 was a matrimonial asset having been acquired during the subsistence of the marriage and to which s. 76(1) of Act 164 applied. However, if the High Court was not minded to allocate a half share to the respondent, Mr. Teo submitted that the appellant's entitlement was at least a factor fairly to be taken into consideration in arriving at a figure for the monetary award for her past contribution to the home and family in connection with Asset No. 3.

Relying on *Wong Amy's* case, Mr. Puthucheary submitted in the High Court that Asset No. 7 was acquired well past the days of amity and union, was not yet ready and was not a matrimonial asset subject to division. *Wong Amy's* case followed the decision in *Re Bishop's* case.

The High Court observed that in the present case the respondent made no claim on Asset No. 7 in his answer to the petition. It followed that no issue of the equity of the respondent in Asset No. 7 arose for the court's decision. But even if it did, the court held that it was not bound to follow the decision in *Re Bishop's* case. It stated that it was a fact that the appellant petitioner (not the respondent as mistakenly referred to in its judgment) withdrew the RM65,000 and used it to purchase Asset No. 7 and in its view that fact should be taken into consideration along with other facts and circumstances in determining the question of what was the appropriate order to make in the division of Asset No. 3. It settled on the monetary award chiefly because the appellant had preempted it by the fact of the withdrawal from the joint account and the respondent did not have a roof over his head. On the quantum of the award, it fixed a sum of RM25,000 for her past contribution to the home and family. That figure must of course be taken to be in addition to the said figure of RM65,000.

All in, on the face of it, the monetary award by the High Court worked out to be RM90,000 for the appellant's past contribution to the home and family. We will come back to this point later.

We agree with the observation of the High Court that the respondent made no claim on Asset No. 7 in his answer. Consequently, whether the respondent had an equity in Asset No. 7 was not an issue there or here. However, the RM65,000 withdrawn from the joint account was an issue expressly raised by the respondent in his answer. The appellant admitted in cross-examination that the moneys in the joint account belonged to her and the respondent. The respondent did not dispute that. Nothing was known of the final balance in the joint account except that the appellant withdrew the RM65,000 before she closed it. Had it not been withdrawn the RM65,000 would have remained in the joint account as the final balance or part thereof. In law and in fact the RM65,000 was the joint property of both the appellant and the respondent: see *Halsbury's Laws of England* 4th edn. vol. 22 para 1037 entitled "joint banking account". It was a matrimonial asset acquired during the marriage by their joint efforts and thus was subject to division under s. 76(1) and (2) of Act 164. The particular point of law which arose in this appeal was whether the High Court could have ordered a division of the RM65,000 which had been withdrawn by the appellant to purchase Asset No. 7 in her sole name and

the joint account closed thereafter. *Re Bishop's* case did not decide on this point nor touch on it as it did not arise there. However, it arose in *Jones v. Maynard* [1951] 1 Ch. 572 where Vaisey J at p. 576 held:

> I hold that the plaintiff is entitled to judgment for one half of the sum which the defendant drew out of the banking account on the day when it was closed; and
>
> ...

Both *Re Bishop's* case and *Jones's* case were referred to in *Heseltine v. Heseltine* [1971] 1 All ER 952 (CA) where Lord Denning MR stated the principle of law at p. 956 d-e thus:

> On this point we have been referred to the cases on joint account. I need not go through them all. They were all considered by Stamp J in *Re Bishop* [1965] 1 All ER 249 (decd), *National Provincial Bank Ltd v. Bishop*. In some cases where husband and wife each contribute to a joint account, the proper inference is that they are putting their moneys into the account with the intention that they should belong to them both jointly. If the marriage breaks down, investments made out of that account belong to them jointly, usually half and half, although in the name of one only: see *Jones v. Maynard* [1951] 1 All ER 802.

To our mind the principle of law stated by Lord Denning MR and holding of Vaisely J in the passages quoted, are in accord with the principles enacted in s. 76(1) and (2) of Act 164. Thus the appellant and the respondent would have been entitled to one half (1/2) of the RM65,000 each upon its division by the High Court, that was to say, RM32,500. The question here was not whether the respondent had an equity in Asset No. 7 to the value of RM32,500. That was irrelevant since the respondent made no claim to Asset No. 7 as we said before. The relevant question raised by Mr. Navaratnam was whether it was proper for the High Court to have taken into account the RM65,000 withdrawn from the joint account in quantifying the monetary award for the appellant's past contribution to the home and family in the division of Asset No. 3. To the extent that one half (1/2) of RM65,000 ie, RM32,500 legally belonged to the respondent, in our view, it was only proper for the High Court to take that amount into consideration but not the entire RM65,000. Taken together with the RM25,000 awarded by the High Court, the aggregate monetary award to the appellant was RM57,500 for her past contribution to the home and family – not RM90,000 on the face of it as mentioned earlier.

Mr. Navaratnam submitted that in the division of Asset No. 3, the fairest result would be a ratio of 51:49 in favour of the respondent. There was no evidence of the market value of Asset No. 3 at the time of the presentation of the divorce petition. The incidence of proof of such market value was on the appellant which she had not discharged. There was oral evidence of the appellant that the market value of Asset No. 7 was more than RM150,000. Mr. Teo submitted that the market value of Asset No. 7 and Asset No. 3 was more or less the same (ie, RM150,000) which submission was not disputed by Mr. Navaratnam. On the footing that the market value of Asset No. 7 and Asset No. 3 was more or less the same, it was clear that the monetary award of RM57,500 for her past contribution to the home and family constituted no less than one third (1/3) of such market value of Asset No. 3. *Vis-a-vis* the appellant, the respondent received a greater proportion in terms of the market value given for Asset No. 3 but no greater than two thirds (2/3).

Under s. 76(3) and (4) of Act 164 which governed the division of Asset No. 3, the High Court was empowered to divide Asset No. 3 as it thought "reasonable". Given the mandatory direction to the High Court in s. 76(4) namely, "but in any case the party by whose effort the assets were acquired shall receive a greater proportion", it made little or no sense to talk of "fairest result" in the sense of evenness in the result of a division of Asset No. 3. In short, the result was bound to be uneven. As we understood it, the relevant question was whether the monetary award of RM57,500 (not RM90,000) was reasonable in the context of a division of Asset No. 3 having regard to the mandatory direction in s. 76(4). In our view, the monetary award given to the appellant could not be said to be unreasonable: (see *Lee Yu Lan v. Lim Thian Chye* [1984] 1 MLJ 56). It conformed to the mandatory direction in s. 76(4). If it were RM90,000, then clearly it would have been unreasonable and contrary to the mandatory direction in s. 76(4), given the market value of Asset No. 3 was RM150,000 more or less.

Next, Mr. Navaratnam submitted that if it was proper for the High Court to have taken the RM65,000 into account, then the total amount withdrawn from the joint account for the respondent's logging business should also be taken into account. The short answer to that was that the amounts paid in and withdrawn from the joint account by each spouse were irrelevant: see *Halsbury's (ibid)* para 1037.

Before leaving Asset No. 3, it was perhaps not unfair or incorrect to observe that in the first place, the choice of a monetary award amongst others, for her past contribution to the home and family was the choice of the appellant alone. Having decided on that, she alone fixed the quantum

by withdrawing RM65,000 from the joint account and invested it in Asset No. 7 in her sole name. Thereafter, she wanted more – this time, a half share or a 51:49 share in the proprietary interest of Asset No. 3 or the equivalent value in its proceeds of sale. In short, she wanted Asset No. 7 exclusively to herself and also a share in Asset No. 3. In our view the appellant was being unreasonable and excessive in her demands. Having committed herself to a monetary award and benefitted from it, it was no longer possible for her to claim any share in Asset No. 3 or in its proceeds of sale. The idea of a monetary award originated from her and the High Court was plainly right to stick to her commitment by taking into account one half (1/2) of the RM65,000 if not the whole, in quantifying such award.

For the reasons given, we agreed entirely with the decision of the High Court that a monetary award was the appropriate order to make in the circumstances of this case and we disagreed with the submission of Mr. Navaratnam for a vesting order or an order of sale. We also disagreed with Mr. Navaratnam that the RM65,000 should be disregarded entirely in the quantification of the monetary award. We agreed with the High Court that it was proper to take into account the RM65,000 but only to the extent of one half (1/2) thereof which belonged to the respondent. We also agreed with the award of a further sum of RM25,000 thereby bringing the monetary award to RM57,500 in aggregate as the appellant's contribution to the home and family in the division of Asset No. 3. We found no merit in the submission of Mr. Navaratnam on matter (c).

We come now to Asset No. 6. The petition made no mention of it. By para 5(f) of his answer to petition, the respondent prayed for a transfer of the registration of Asset No. 6 from the appellant to the respondent and the delivery of possession to him within 14 days. The appellant was silent in her reply on Asset No. 6.

The evidence in chief of the appellant was also silent on Asset No. 6. Cross-examined on it, her evidence was that Asset No. 6 was purchased in 1993 for her by the respondent at the price of RM65,000. Moneys for the payment belonged to both of them and were from the joint account. Asset No. 6 was registered in her name and was in her possession. There was no re-examination of her evidence on Asset No. 6.

In examination-in-chief, the respondent said that in 1993 he purchased Asset No. 6 for the use of the family with moneys from the joint account. Asset No. 6 was purchased to replace an old car which was used by the family. The price was RM65,000. Asset No. 6 was registered in the appellant's name and in her possession. The respondent said that he was entitled to Asset No. 6 because he paid for it. There was no cross-examination by Mr. Puthucheary on Asset No. 6 whatever.

In the High Court Mr. Teo submitted that Asset No. 6 be transferred to the respondent within 14 days from the date of the court order; that it was purchased by the respondent even though the moneys were from the joint account. According to learned counsel, the reason for registering Asset No. 6 in the appellant's name was to facilitate the payment of road tax, insurance and other incidental charges as the respondent was in Sabah. There was no response from Mr. Puthucheary on Asset No. 6 in his submission.

In that state of affair the High Court awarded Asset No. 6 to the respondent and gave its reasons thus:

> With regard to the said vehicle, the evidence shows that the car was bought in 1993 at the cost of RM65,000, at the insistence of the respondent and in the name of the petitioner from the moneys in the joint account. The petitioner has insisted that the motor-car belongs to her. In my view, it would be difficult to assess the extent of her contribution towards this asset and furthermore, she had enjoyed the use of this asset for almost three years. Under the circumstances I would order that the petitioner do execute the necessary transfer of the vehicle in favour of the respondent and that she do deliver possession of the vehicle within 14 days from the date of this order.

In his submission to us Mr. Navaratnam's argument was that it had always been regarded that the appellant had the ownership of Asset No. 6 which should not now be disturbed. He submitted that on the authority of *Ching Seng Woah's* case, the respondent could not be permitted to reprobate what he had approbated. Further, he argued that possession of Asset No. 6 should remain with the appellant as she had enjoyed its use from the beginning. In this regard he submitted that the High Court failed to have regard for the doctrine of advancement in *Moate v. Moate* [1948] 2 All ER 486.

Mr. Teo submitted that the High Court was correct in its finding of fact that Asset No. 6 belonged to the respondent although registered in the appellant's name. He pointed out that the respondent did in his examination-in-chief state that he bought Asset No. 6 in 1993 for the use of the family. On the presumption of advancement, he submitted that it was not applicable as it was never intended that Asset No. 6 should be for the appellant and was never regarded as the appellant's. He argued that the presumption of advancement was not an immutable rule, rather only a guideline followed by the court when it searched for the intention to be imputed to the parties and he referred to *Neo Tai Kim v. Foo Stie Wah* [1985] 1 MLJ 397 (PC). Lastly, he submitted that since there was no dispute by the appellant in her reply or submission or any cross-examination of the respondent, the appellant must be taken to have admitted the respondent's claim of ownership of Asset No. 6.

Taking Mr. Teo's last point of submission first, we would have agreed with him that such an inference of admission might properly have been drawn against the appellant. That would have prevented any further dispute of ownership and possession of Asset No. 6. However, we observed that evidence of dispute as to ownership of Asset No. 6 arose from his cross-examination of the appellant.

Faced with such oral evidence recorded, it was inevitable that the High Court decide on the dispute.

On Mr. Teo's first point of submission, he did not identify where in the judgment, the High Court made such finding. To our knowledge the only place where it dealt with Asset No. 6 was in the penultimate paragraph of its judgment which we quoted in full in this judgment. From our reading of that paragraph, the High Court made no such finding expressly. As we understood that paragraph, the High Court accepted the oral evidence of both sides that Asset No. 6 was acquired with moneys from the joint account. It accepted for a fact that the appellant made a monetary contribution to the acquisition of Asset No. 6. The only inference from this fact was that the appellant was a joint owner with the respondent of Asset No. 6. However, the difficulty which faced the High Court was in determining the extent of her contribution. For that reason and also for the reason that she had the use of Asset No. 6 for the past three years, the High Court felt disinclined to allocate any specific share to the appellant. Thus did we think that Mr. Teo had mistakenly attributed to the High Court a finding that Asset No. 6 belonged to the respondent which it did not make. In the result it ordered the transfer and possession of Asset No. 6 in favour of the respondent. In effect that meant the award of Asset No. 6 to the respondent to the exclusion of the appellant.

In so far as Mr. Navaratnam's argument that it had always been regarded that the appellant had the ownership of Asset No. 6 was concerned, we would observe that it was raised to us for the first time ever. Asset No. 6 as pointed out earlier was not even mentioned in the petition or the reply notwithstanding that the respondent expressly claimed it in his answer. Likewise too with Asset No. 7. In this regard it is not inappropriate to point out that there were non compliance with the requirements of s. 57(1)(e) of Act 164 and r. 56(1)(b) and (2)(a) of the Divorce and Matrimonial Proceedings Rules 1980 (P.U.(A)32/80). Further, the evidence of the appellant in cross-examination stopped short of announcing the actual purpose, if there was one, for which the respondent acquired Asset No. 6 for her. So there was no issue of approbation or reprobation here. The respondent's evidence was that Asset No. 6 was acquired to replace an old

car and that its purpose was for the use of the family. The evidence of the respondent on this point stood unrebutted. Mr. Puthucheary made no submission whatever on Asset No. 6 in the High Court. Thus in our view there was no substance or merit in this argument.

On his second point of submission namely, failure of the High Court to have regard for the presumption of advancement in *Moate's* case, surely the query here was, was *Moate's* case ever cited to the High Court and who should do that if it was intended to rely on that presumption. As observed earlier, there was no response from Mr. Puthucheary on Asset No. 6 in his submission. Consequently, there was no argument whatever before or decision by the High Court on that presumption and we decline to deal with it here. Thus we find no merit in the complaint of Mr. Navaratnam.

We stand on common ground with the High Court in regarding Asset No. 6 as a matrimonial asset subject to division under s. 76(1) and (2) of Act 164 although registered in the sole name of the appellant. Insofar as the moneys for the acquisition of Asset No. 6 were derived from the joint account, it followed from an application of the principle of law stated by Lord Denning M.R. in *Heseltine's* case in the passage quoted above that Asset No. 6 was an investment made out of that account which belonged to the appellant and the respondent jointly usually half and half, although in the name of the appellant only. Such a division was in accord with the mandatory direction in s. 76(2). In short, the appellant and the respondent should each get a half share in Asset No. 6. Nothing was known of the value of Asset No. 6 at the time of presentation of the petition. The incidence of proof was on the appellant and she had not discharged it. Asset No. 6 was acquired in 1993 at the cost of RM65,000. At the time of the petition it was in the possession and use of the appellant for about three years. It would have depreciated in value. Since no valuation of Asset No. 6 was given it was not possible to order a division. On the other hand, it is a fact that because of the order of stay granted, the appellant has had the use and possession of Asset No. 6 up to this day which is six years from acquisition. In our view the appellant will already have had her moneys worth from the use of Asset No. 6 by now. In the circumstances, like the High Court, we are also minded that Asset No. 6 should be awarded to the respondent exclusively.

Lastly on the matter of maintenance the appellant claimed:

(i) arrears of maintenance for herself in the sum of RM54,000 at the rate of RM1,500 per month for three years;

(ii) arrears of maintenance for the son in the sum of RM21,600 at the rate of RM600 pm for three years;

(iii) future maintenance for herself at the rate of RM1,500 commencing from the date of the order.

In his answer to petition, the respondent prayed that no arrears of maintenance or future maintenance needed to be paid to the appellant or their son.

From her evidence, the main complaint of the appellant was that the respondent had not remitted any money from Sabah for the maintenance of herself and the son in Johor Bahru from 1991 to 1994. This was a fact acknowledged by the respondent for three reasons: firstly, he did not have the means to do so for he was not earning any income as he did before; secondly, he just started business in Sabah and needed money from the joint account for that purpose to be sent to him by the appellant but unfortunately his business failed and he had no money to send home; and thirdly, there was no shortage of funds in the joint account and the monthly rent of RM5000 from Asset No. 4 was enough to support them.

The dispute was one of fact, not of law. The issue as the High Court correctly stated was whether there was anything to show that the respondent had not provided maintenance for the appellant from July 1991 to July 1994, and that he had refused or neglected reasonably to provide for their son prior to 19 July 1993.

On that issue, the High Court reviewed the oral evidence of the respondent, the appellant and their son and found that (a) there was no lack of funds to maintain the appellant and the son prior to 1991 because the respondent had been sending regular allowances to the appellant and in addition she had been in receipt of monthly rents of RM400 to RM500 from Asset No. 2 before it was sold in 1989; and (b) neither the appellant nor the son was actually in dire straits from August 1991 because she was in receipt of monthly rents of RM5,000 from Asset No. 4. On these facts the High Court held that:

> The petitioner and the said child seem to have been adequately provided for from the monies drawn by her from the joint account; she could freely make withdrawals from the joint account and to me the monthly sum of RM3,500 which she utilised for living expenses for the family would tend to denote that they enjoyed a standard of living of an average middle class family in Malaysia. The said child received his education both at the primary and secondary level in Singapore and was later seen through college also in Singapore. He gave evidence that this monthly expenses at Ngee Ann College were in the region of RM400 per month and that money came from his parent's joint account. If all that did not amount to adequate maintenance, I do not know what does.

> Having considered the above evidence and the position that the respondent was in, I cannot see how the petitioner's claim for arreas of maintenance for herself and the said child can stand at all and I hereby dismiss both these prayers.

Before us Mr. Navaratnam submitted that the High Court erred in its fact finding in that it had concentrated chiefly on the joint account. As we said before that account was a mixed fund and a common fund to which both had contributed although largely by the respondent. The appellant managed the account. She had custody of the cheque book and was responsible for any withdrawal or deposit. It was common ground that expenses for household needs and for the education needs of the son in Singapore were paid from that account. That being the case, it was inevitable that any discussion of the issue of past maintenance must focus on the joint account ie, the state of the account, in particular, whether there was sufficient fund or the lack of it. On this point there was no suggestion from the appellant, the respondent or the son that there was insufficient fund to meet their needs. Indeed the RM65,000 for Asset No. 6 acquired in 1993 was paid out of that account; and so was the RM65,000 paid towards the purchase price of Asset No. 7 in 1994. What was not known to the High Court and to us was exactly how much was the credit balance in the joint account before its closure by the appellant. In our view, the High Court did not err in its approach and there was no good reason in law to disturb its finding. Accordingly, we uphold its decision that there had been adequate maintenance and that there were no merits in the appellant's claim for arrears in (i) and (ii) above.

On the appellant's claim for future maintenance for herself in (iii), the High Court after comparing the plight of the respondent with that of the appellant concluded that the appellant was better off in that she still received income from her past time activity and could depend on the son for financial support. The respondent, on the other hand, was jobless with little or no prospect of being gainfully employed at the age of 60 plus in the logging or timber trade after suffering a stroke. He continued to stay in rented premises in Sabah without the support of their son. In those circumstances, it was of the view that it would be unjust to order him to maintain the appellant. Consequently, it dismissed the appellant's claim in (iii) above.

On the facts and circumstances which the High Court found it was clear that the respondent had no means and was in no position to support the appellant. We agreed with the High Court that it woud be unjust to order him to do so presently. However, should there be a change in his financial circumstances for the better, he should, in our view, be ordered to maintain the appellant. In the premises, we think that it would be more appropriate to make no order in respect of the claim in (iii) above for the moment.

Instead of a dismissal, we direct that the appellant be at liberty to apply to the High Court should there be a change in the financial circumstances of the respondent.

For all these reasons stated, we affirm and modify the relevant ancillary orders made by the High Court thus:

(1) that the respondent pay to the appellant RM25,000 in one lump sum and within one (1) month from the date hereof as her contribution to the home and family;

(2) that simultaneous with the payment in (1) above the appellant's application for one-half (1/2) share in Asset No. 3 be dismissed and the caveat thereon be withdrawn by the appellant;

(3) that Asset No. 6 be transferred to the respondent within fourteen (14) days from the date hereof;

(4) that the appellant's application for three years arrears of maintenance for herself and the son be dismissed.

We make no mention of the High Court order for delivery of vacant possession of Asset No. 3 for the simple reason that Mr. Teo informed at the hearing that the appellant had already moved out of Asset No. 3 into Asset No. 7, a fact not disputed by Mr. Navaratnam.

For the same reasons we also set aside the order of dismissal of the appellant's application for future maintenance. We make no order for future maintenance but direct that the appellant shall be at liberty to apply to the High Court for it if there is a change of circumstances. To that extent this appeal is allowed. Each party shall bear its own cost. Deposit, if any, to be refunded to the appellant. Order accordingly.